

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 26**

**MASONRY REINFORCING  
CORPORATION OF AMERICA**

Employer

And

**Case 26-RC-8228**

**LABORERS' INTERNATIONAL  
UNION OF NORTH AMERICA, AFL-CIO**

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.<sup>1/</sup>

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purpose of the Act to assert jurisdiction herein.<sup>2/</sup>

3. The Petitioner involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:<sup>3/</sup>

**Included:** All production and maintenance employees.

**Excluded:** All truck drivers, office clerical, professionals, guards, and supervisors as defined in the Act.

### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained the status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented

for collective bargaining purposes by the Laborers' International Union of North America.

### **LIST OF VOTERS**

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U. S. 759 (1969). Accordingly, it is directed that an eligibility list containing the **full** names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days of the date of this Decision. The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Memphis Regional Office (Region 26), 1407 Union Avenue, Suite 800, Memphis, TN 38104, on or before **December 26, 2000**.

### **RIGHT TO REQUEST REVIEW**

Under the provision of Section 102.67 of the Board's Rules and Regulations, a Request for Review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street,

N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **January 2, 2001**.

**DATED**, December 18, 2000, at t Memphis, Tennessee.

/S/

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Ronald K. Hooks, Regional Director  
Region 26, National Labor Relations Board  
1407 Union Avenue, Suite 800  
Memphis, TN 38104-3627  
tel: 901-544-0018

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<sup>1/</sup> The Employer filed a timely brief which has been duly considered.

<sup>2/</sup> The parties stipulated that Masonry Reinforcing Corporation of America is a North Carolina Corporation with a place of business located in Memphis, Tennessee. During the past twelve months, a representative period, the Employer from its Memphis, Tennessee location sold and shipped products valued in excess of \$50,000.00 directly to points located outside the State of Tennessee. During the same representative period, the Employer purchased and received goods valued in excess of \$50,000.00 directly from points located outside the State of Tennessee.

<sup>3/</sup> By its petition in this matter, the Petitioner seeks to represent a unit of all production and maintenance employees at the Employer's Memphis, Tennessee location. The Petitioner does not seek to represent the five over the road truck

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drivers. The Employer seeks their inclusion in the unit because, it argues, they share a sufficient community of interest.

The Employer produces metal wiring that is used to reinforce and stabilize brick or block buildings. It has four departments: the Spot Welding Department, the Wire Drawing Department, the Fabrication Department and the Warehouse Department. The Warehouse Department is comprised of the over the road truck drivers, a local truck driver and three warehouse employees. The warehouse employees pull orders, make sure the piece count is correct and use the forklift to load and unload the trucks. The entire department is supervised by the Warehouse Manager, Jerry C. Ward.

Two of the truck drivers primarily drive between the Employer's Memphis, Tennessee location and its Charlotte, North Carolina location. The three other truck drivers deliver to the Employer's distributors in Dallas, Texas; Houston, Texas; Chicago, Illinois and Kansas City, Kansas. They then pick up "backhauls" of raw material for transportation to Memphis. They are paid by the mile for the 75-90% of their time that they spend on the road.

The truck drivers receive an hourly wage for the other 10-25% of the time they spend working in the Warehouse Department. They receive the same training as the other warehouse employees. The Employer argues that the truck drivers perform the same duties as the warehouse workers, but the record reflects otherwise. The warehouse workers drive forklifts, pull orders, load and unload the trucks. While the Warehouse Manager testified that the drivers spend 20-25% of their time in the warehouse, it is not clear from the record that the

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truck drivers spend any significant amount of time during the work week doing the same type of work as the warehouse workers. When asked if the truck drivers ever just come in and take a truck already loaded and leave, the Warehouse Manager testified that he tries to make that [occur on] a regular basis. The Warehouse Manager also testified he has two forklifts that are used by two warehouse workers constantly to load and unload the trucks. He also stated that they are now fortunate enough to have a forklift driver on three shifts. "As long as that guy is there they [the trucks] are ready to go," testified the Warehouse Manager. The truck drivers only operate a forklift, load and unload their own truck on the weekends. The record reflects that this occurs only 10% of the time.

The truck drivers' hourly wage is the same as that received by the most senior warehouse employee. But the record reflects that their yearly salary is slightly less than double that of this employee. The Department of Transportation regulates the hours worked by the truck drivers. They fill out time sheets, while all other employees use a time clock. The truck drivers receive the same health benefits, participate in the same 401(k) plan, have the same vacation policy and receive the same accidental death and dismemberment insurance coverage as all other employees at the Memphis location. The truck drivers follow the same work rules and have the same probationary period as the other employees. They use the same lunchroom, break room, bathroom and parking lot as the other employees when at the Memphis location. If the truck drivers choose to wear a uniform, they wear the same uniform as that supplied to other employees who choose to wear one.

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When truck drivers have been placed on light duty they were re-assigned to work in the Fabrication Department. However this has happened only three times and is sporadic at best. This does not reflect that the positions are interchangeable as argued by the employer. The record reflects that there has never been any instance of an employee transferring to the position of truck driver from one of the other departments. The truck drivers are hired in as drivers.

The truck drivers do work the same number of hours as the other employees as the Employer asserts. However, they do not work the same hours. The truck drivers do not work a specified shift, as the record reflects that a forklift operator is scheduled for all shifts so that the truck can be loaded or unloaded whenever it pulls in. The record also reflects that the truck drivers work on the weekends when no other employees are present.

In determining whether a group of employees should be included in a bargaining unit a community of interest analysis is utilized. The community of interest rule for inclusion or exclusion of truck drivers in production and maintenance units is stated in ***E. H. Koester Bakery Co.***, 136 NLRB 1006, 1011 (1962):

In our evaluation we shall consider, among others, the following factors: (1) Whether they have related or diverse duties, mode of compensation, hours, supervision, and other conditions of employment; and (2) whether they are engaged in the same or related production or adjunct activities. If the interests shared with other employees is sufficient to warrant their inclusion, we shall include the truck drivers in the more comprehensive unit. If, on the other hand, truck drivers are shown to have such a diversity of interest from those of other employees as to negate any mutuality of interest between the two groups, we shall exclude them.

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The truck driver's duties for a substantial amount of the time are different than those of the other employees. They spend 75-90% of their time driving. Only 10-25% of the time are they engaged in duties similar to the other employees in the Employer's Warehouse Department and this is generally when the other warehouse employees are not present. Their mode of compensation is different from the other employees. Their salary is determined by a combination of an hourly sum and an amount per mile driven that week. All other employees are paid solely by the hour. The truck drivers work different hours than the other employees. They do share the same supervisor with the other warehouse workers. They share some other conditions of employment with the other employees and receive the same benefits package. The truck drivers are not normally engaged in the same or related activities as the other employees. While all other employees are involved in the maintenance and production of the metal wire at the Memphis location at all times the truck drivers spend a substantial amount of their time driving either finished product or raw materials to and from the Memphis location. Under the **Koester** Rule the truck drivers have such a diversity of interest from those of other employees as to negate any mutuality of interest between the two groups.

**Marks Oxygen Company**, 147 NLRB 228 (1964) added to the Koester Rule with the following factors to be considered in deciding whether to include truck drivers in a production and maintenance unit:

- (a) a plant wide unit is presumptively appropriate; (b) a petitioner's desires as to the unit is always a relevant consideration; and (c) it is not essential that a unit be the most appropriate unit.



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While a plant wide unit is presumptively appropriate, the truck drivers do not satisfy the criteria of the Koester Rule supporting their inclusion in the production and maintenance unit. Thus the presumption is rebutted. This is an example of a situation where the truck drivers may be considered to have interests distinct from production and maintenance employees. ***General Electric Co.***, 148 NLRB 811 (1964). See also ***National Broadcasting Co.***, 231 NLRB 942 (1977).

While the petitioner's desire is not the main consideration, it is a relevant consideration. The record reflects that the Petitioner does not traditionally represent truck drivers. [I]t is not the Board's function to compel all employees to be represented or unrepresented at the same time or to require that a labor organization represent employees it does not wish to represent, unless an appropriate unit does not otherwise exist. ***Mc-Mor-Han Trucking Co.***, 166 NLRB 700, 701 (1967). The unit requested by Petitioner is an appropriate unit. It is not the function of the Board to compel the Petitioner to represent truck drivers that do not share a sufficient community of interest with the employees the Petitioner does seek to represent. In a situation where a sufficient community of interest has not been established, the truck drivers are appropriately excluded from the bargaining unit.

The facts of this case may be distinguished from cases in which truck drivers were included in a production and maintenance unit. In those cases the truck drivers were found to be functionally integrated with plant employees so as to preclude separate representation where (a) the drivers spent a substantial amount of time performing the same function as other employees, some of whom

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performed driving duties; (b) the drivers had the same supervision, pay scale, and benefits as other employees; and (c) the drivers' conditions of employment were substantially the same as that of the others. **Standard Oil Co.**, 147 NLRB 1226 (1964). See also **Philco Corp.**, 146 NLRB 867 (1964). **Donald Carroroll Metals**, 185 NLRB 409 (1970). These conditions are conjunctive. The truck drivers in question do not meet the first condition because they spend a substantial amount of time driving. This is a different function than that of the other employees who spend all of their time at the Memphis location where they produce the metal wire.

The facts of this case may also be distinguished from the line of cases cited by the Employer. **Kalamazoo Paper Box Corp.**, 136 NLRB 134 (1962) and its progeny deal with the severance of truck drivers from existing production and maintenance units. They do not deal with the situation as presented here, where there is no bargaining history and a lower standard is used for the inclusion or exclusion of truck drivers from the unit.

The Employer also cited **Sturgis**, 331 NLRB No. 173 (2000) as reinforcement by the Board of the community of interest test. The test used there is whether a mutuality of interests in wages, hours, and working conditions exists among the employees involved. As discussed, the truck drivers herein are paid using different criteria than the other employees. They are paid both by the hour and per mile. This figure, when compared to the warehouse worker who receives the same hourly wage, equals an amount almost double his yearly salary. The truck drivers do not work the same hours as the other employees. The truck drivers do share in some of the same working conditions as the other

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employees. However, using the community of interest test as stated in ***Sturgis*** the truck drivers are not required to be included in the bargaining unit.

It will be observed that there is nothing in the statute which requires that the unit for bargaining be the only appropriate unit, or the most appropriate unit; the Act only requires that the unit be “appropriate,” that is, appropriate to insure to employees in each case “the fullest freedom in exercising the rights guaranteed by this Act. ***Overnite Transportation Co.***, 322 NLRB 723 (1996). The unit requested by Petitioner is an appropriate unit.

In light of the above, the evidence fails to establish that the five over the road truck drivers in question share a sufficient community of interest with the other employees to require their inclusion in the unit. I shall, therefore, exclude the aforementioned five drivers from the unit. There are approximately fifty employees in the unit found appropriate herein.

#### CLASSIFICATION INDEX

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440-1760-2420-8000